February 9, 2009

VIA e-mail to courtney.karp@state.ma.us

Philip Giudice
Commissioner
Massachusetts Department of Energy Resources
100 Cambridge Street
Suite 1020
Boston, Massachusetts 02114

Re: 225 CMR 14.00, 15.00 and 16.00
Comments of Constellation NewEnergy, Inc.

Dear Commissioner Giudice,

Pursuant to the Notice of Public Hearing issued in this matter, Constellation NewEnergy, Inc. ("CNE") and Constellation Energy Commodities Group, Inc. ("CCG") (collectively, "Constellation") hereby offers the following written comments on the above referenced regulations. Constellation provided oral testimony at the February 5, 2009 public hearing on this matter, and these written comments support that oral testimony. This matter involves revisions to the Class I Renewable Energy Portfolio Standards ("PRS Class I") set forth in 225 CMR 14.00; a new Class II Renewable Energy Portfolio Standard ("RPS Class II") set forth in 225 CMR 15.00; and a new Alternative Energy Portfolio Standard ("APS") set forth in 225 CMR 16.00 (collectively, the "Draft Regulations"). The Department of Energy Resources (the "Department") has promulgated the Draft Regulations pursuant to Section 32 of the Green Communities Act of 2008 (the "Act"), amending Section 11F and adding Section 11F1/2 of Chapter 25A of the General Laws of Massachusetts.

CNE is a Retail Electricity Supplier in the Commonwealth of Massachusetts. CCG is a market participant in ISO-New England and the adjacent control areas and participates in solicitations for standard offer service in Massachusetts. As such, each may be impacted by the Draft Regulations.

1. The Draft Regulations Omit Critical Effective Dates.

The Act provides that, with respect to RPS Class II, "[e]very retail electric supplier providing service **under contracts executed or extended on or after January 1, 2009**, shall provide a minimum percentage of kilowatt-hour sales to end-use customers in the commonwealth from Class II renewable energy generating sources." (Section 32 amending MGL 25A Section 11F (d), *emphasis added*). Similarly, the Act provides that, with respect to APS, "[e]very retail electric supplier providing service **under contracts executed or extended on or after January**

1, 2009 shall provide a minimum percentage of kilowatt-hour sales, as determined by the department, to end-use customers in the commonwealth from alternative energy generating sources." (Section 32 adding MGL 25A Section 11F1/2 (a), *emphasis added*). Thus, under the express terms of the Act, the obligation on a retail electric supplier to provide its customers with a percentage of energy generated by RPS Class II and APS resources applies only to contracts executed or extended on or after January 1, 2009. Conversely, under the Act, a retail electric supplier is **not** obligated to provide its customers with a percentage of energy generated by RPS Class II and APS resources for contracts executed before January 1, 2009.

The draft regulations omit this important effective date of the obligation to procure and provide generation from RPS Class II and APS. As a result, retail electric suppliers that have customer relationships based upon contracts executed or extended prior to January 1, 2009 could arguably be required to provide energy from RPS Class II and APS resources. Constellation does not believe this to be an intentional finding on the Department's part; however, as drafted the regulations are directly contrary to the requirements of the Act and would create significant economic hardship on retail electric suppliers who entered into agreements prior to January 1, 2009 without accounting for the cost of complying with these new regulations.

As I am sure you are aware, the Department "has only the powers and duties expressly conferred upon it by statute" and has no inherent authority to "promulgate rules or regulations that conflict with the statutes or exceed the authority conferred by the statutes." (See, *Morey* v. *Martha's Vineyard Comm'n,* 409 Mass. 813, 818, 569 N.E.2d 826 (1991); *Massachusetts Mun. Wholesale Elec. Co.* v. *Energy Facilities Siting Council*, 411 Mass. 183, 194 (1991); *Massachusetts Hosp. Ass'n* v. *Department of Med. Sec.,* 412 Mass. 340, 342, 588 N.E.2d 679 (1992).) Because the draft regulations arguably impose obligations on retail electric suppliers that are specifically precluded under the Act, the regulations are in conflict with the Act, and are beyond the statutory authority of the Department.

Constellation therefore requests that the Department clarify in the final regulations that the RPS Class II and APS resources obligations apply only to contracts executed or extended on or after January 1, 2009.

2. <u>The Draft RPS Class I and Class II Regulations are Unclear Regarding Capacity Obligations</u>.

A. Each of the Draft RPS Class I and RPS Class II regulations contains provisions regarding ISO New England capacity obligations for generating facilities to qualify as RPS Class I or Class II Renewable Generation Units (225 CMR 14.05(1)(e) and 225 CMR 15.05(1)(e)). Each of these sections contains the following language:

> (1) The amount of the generation capacity of the Generation Unit whose electrical energy output is claimed as RPS Class I Renewable Generation shall not be committed to any Control Area other than the ISO-NE Control Area ***unless such Generation Unit has entered into a Capacity Obligation in another Control Area before the start of the first available compliance year for the ISO-NE Forward Capacity Market***, in which case this

> subsection shall apply upon the expiration of that Capacity Obligation. (225 CMR 14.05(1)(e)(1) and 225 CMR 15.05(1)(e)(1), *emphasis added*)

The Department should clarify the highlighted language. It is unclear what the Department means by a Generation Unit entering into "Capacity Obligation" in another Control Area, as the term "Capacity Obligation" is undefined in the Draft Regulations. Does that term contemplate only participating directly in an ISO capacity auction or does it include bilateral capacity obligations? Does that provision imply that entering into a "Capacity Obligation" in another Control Area is on and subject to the terms of the other Control Area's tariff? Further, it is not clear what the Department means by the phrase "before the start of the first available compliance year for the ISO New England Forward Capacity Market." Does this mean the compliance year that is the subject of the next Forward Capacity Auction ("FCA") or the next compliance year for which ISO New England has determined there is a capacity need? How does this requirement coordinate with the need for the Generation Unit to participate in an FCA several years prior to the compliance year if it is to commit to the ISO New England control area? As generating units currently commit their capacity to neighboring control areas and sell their energy output into ISO New England to receive Massachusetts renewable energy credits, it is important that the Department clarify these provisions so that generators understand their obligations going forward.

B. The Draft Regulations for RPS Class I contain a provision at 14.05(1)(e)(2) that exempts from the requirements of that paragraph Generation Units for which the Department had an administratively complete Statement of Qualification prior to July 2, 2008. Constellation interprets this provision to mean that, if a Generating Unit qualified as an RPS Renewable Generating Unit by that date, even if the Generating Unit is in an adjacent control area, the qualification remains in place, and the generator "will maintain its eligibility under the current rules without taking further action." (*See*, Imports Feasibility Study, October 31, 2008, p. 8) Constellation requests that the Department clarify this point in the final regulations.

Constellation also requests several additional changes or clarifications on this provision. First, 14.05(1)(e)(2) only applies to Non-Intermittent Generation Units. However, Constellation believes that the intent was to apply this provision to intermittent Generation Units also (*see*, Imports Feasibility Study, October 31, 2008, p. 8), and requests that the Department apply the exemption in this paragraph to intermittent Generation Units. Second, Constellation believes that the same exemption should apply to the previous paragraph, 14.05(1)(e)(1). Otherwise, there would appear to be an inconsistency between the two provisions, with subparagraph (1) preventing Generating Units from committing to another Control Area, even if that Generating Unit was exempt from the capacity obligation to ISO-NE under subparagraph (2). Finally, Constellation submits that these exemptions should apply equally to RPS Class II Generating Units under 15.05(1)(e) and requests that the Department effect that change.

C. The Draft Regulations are unclear as to the eligibility of a (non-exempt) Generation Unit to be an RPS Class I or Class II Generating Unit between the time it submits its Statement of Intent to participate in the next ISO-NE FCA and the actual date of the FCA, or even the commencement of the capacity commitment period. As the Department is aware, statements of

intent are due months before the FCA, and the FCA occurs years before the capacity commitment period. It is unclear when during this process a Generating Unit becomes eligible to be an RPS Class I or Class II Renewable Generating Unit. Constellation believes that the intent is that the Generating Unit becomes eligible upon filing its statement of intent with ISO-NE and requests that the Department clarify this point in the final regulations.

3. <u>Sections 14.05(5)(d) and 15.05(3)(d) Are Too Broad and Should Be Amended</u>.

Sections 14.05(5)(d) and 15.05(3)(d) are the Department's implementation of the Act's attempt to prohibit "greenwashing" of renewable energy by limiting the simultaneous import of renewable power into ISO-NE and export of non-renewable power. The Department conducted an Imports Feasibility Study as required by the Act and determined that the Act's requirement that exports be subtracted from renewable imports was not feasible to implement. (*see*, Imports Feasibility Study, October 31, 2008, p. 8-9) As a result, the Department included Sections 14.05(5)(d) and 15.05(3)(d) in the Draft Regulations, which require that,

> [t]he Generation Unit Owner or Operator must provide an attestation in a form to be provided by the Department that it will not itself or through any affiliate or other contracted party, engage in the process of importing RPS Class I Renewable Generation into the ISO-NE Control Area for the creation of RPS Class I Renewable GIS Certificates, and then exporting that energy or a similar quantity of other energy out of the ISO-NE Control Area during the same hour.

It is difficult for Constellation to provide complete comments on this provision without seeing the form of the attestation. However, even without seeing the form itself, it appears from the language of the Draft Regulations that the requested attestation is too broad and will significantly inhibit regional electricity transactions to the detriment of customers within ISO-NE and in other control areas. Market participants such as Constellation will transmit power in and out of ISO-NE to neighboring control areas throughout each hour of each day as they manage their portfolios and respond to price signals in each market. Market participants will engage in cross border trading activities in various markets as well; for instance, a company may import non-intermittent renewable power in the day ahead market and export "brown" power in the real time market, either to the same control area or to another adjacent control area. This type of cross border activity is beneficial to consumers as it ensures that demand is being met with the most efficient resources from the broader geographic market. Additionally, with respect to renewable energy, cross border trading allows renewable requirements to be met by a broader and more diverse pool of resources.

The attestation language as currently drafted could severely inhibit this beneficial cross border activity. First, the prohibition on importing renewable generation and exporting energy "during the same hour" is too broad. Energy companies will react to price signals on either side of a border in real time, and decisions to export power at the end of an hour may be made in complete isolation from decisions to import renewable power at the beginning of an hour or even in the day ahead market. For example, a market participant may import renewable power to ISO-NE from one control area in the day ahead market and then, in real time, export brown power to a

second control area. Certainly, these two transactions would be entirely unrelated and receive different prices in the market; yet, the attestation language in the Draft Regulations would appear to prohibit these transactions. Second, the provision should not include the language "or a similar quantity." Not only is this language vague and subjective in its own right, it would not appear to address the Department's concern that generators are circumventing the renewables requirements by improperly swapping green for "brown" power.

At a minimum, then, the attestation should be limited to simultaneous imports and exports of the same quantity of power at the same interface in the same market (day ahead or real time). Further, the attestation should include an intent requirement such the entity attests that it has not intentionally exported "brown" power from ISO-NE for the purpose of circumventing the Massachusetts renwables regulations. An attestation such as this would be narrowly drawn to meet the Department's objectives without unnecessarily inhibiting regional cross border trading.

Please feel free to contact me if you have any questions regarding these comments.

Respectfully Submitted,

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